(3)

No. 08-917

IN THE

Supreme Court of the United States

ROSEMARIE MCSWAIN,

Petitioner,

v.

MILLICENT WARREN, WARDEN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

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May 29, 2009

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ARGUMENT

As the Respondent (the "State") candidly admitted at oral argument in the court of appeals below, under the Third Circuit's decision in *Nara v. Frank*, 264 F.3d 310 (3d Cir. 2001), *rev'd in part on other grounds by Carey v. Saffold*, 536 U.S. 214 (2002), and the Ninth Circuit's decision in *Laws v. Lamarque*, 351 F.3d 919 (9th Cir. 2003), Ms. McSwain would be entitled to an evidentiary hearing, but in the Sixth Circuit she is not. *See* Pet. App. 237a-238a (the State agreeing that *Nara* and *Laws* "would require remand in this case"); *see also* Pet. 14. The State now attempts to walk away from this concession.

The State's concession before the court below was correct. The issue here is whether a habeas petitioner who has presented uncontested credible evidence of her mental illness is entitled to an evidentiary hearing on the issue of causation—that is, whether her mental illness prevented compliance with the one-year filing deadline of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2244(d). The Third and Ninth Circuits recognize that a showing of mental illness during the period in question is sufficient, without more, to trigger the evidentiary hearing requirement. *Nara*, 264 F.3d at 320 (requiring an evidentiary hearing where "there was *no evidence in the record* that Nara's current mental status *affected* his ability to present his habeas petition") (emphases added); *Laws*, 351 F.3d at 924 (requiring an evidentiary hearing where the petitioner merely "'*alleged* mental

incompetency' in a verified pleading") (emphasis added; citation omitted). The Sixth Circuit, by contrast, denied an evidentiary hearing because Ms. McSwain could not, at the stage of seeking a hearing, establish causation—the very issue upon which the Third and Ninth Circuits require an evidentiary hearing. *See* Pet. App. 15a ("McSwain's speculation about the impact of her mental illness on her ability to timely file her habeas petition is not sufficient to warrant an evidentiary hearing."). This issue, moreover, is particularly important to protect this uniquely vulnerable category of petitioners, who, because of their debilitating mental illnesses, often are incapable of defending their own interests or assisting others in defending them.

The State's attempt to minimize this clear conflict, and its other arguments, are entirely without merit.

1. The State offers three erroneous bases for distinguishing *Nara* and *Laws*. *First*, the State appears to assert that this claim is not properly before this Court because Ms. McSwain did not raise this issue in the district court. *See, e.g.*, Opp. Br. 10, 16. But Ms. McSwain raised her mental illness in the district court, *see* Pet. App. 135a; the district court squarely considered this issue, *see id.* 37a; and, most importantly, it was the *principal issue* addressed in the Sixth Circuit's ruling below, *id.* 9a-16a. The State's suggestion to the contrary is, quite simply, baffling.

Second, the State attacks the quality of Ms. McSwain's evidence of mental illness. *See* Opp. Br.

16. But as the Sixth Circuit determined, "[t]he record contains substantial evidence to support McSwain's assertion that she suffers from a mental illness," Pet. App. 12a, including the diagnoses of *multiple* mental health professionals, all of whom concluded that she suffered from a severe case of Dissociative Identity Disorder ("DID"), *see id.* 155a-231a. To the extent that the State's real claim is that Ms. McSwain failed to demonstrate that her concededly severe mental illness *caused* her to miss the filing deadline, it is precisely this issue of "causation" that has divided the circuits and upon which Ms. McSwain seeks certiorari—the Third and Ninth Circuits have held that an evidentiary hearing is required to determine causation, and the Sixth Circuit has held the opposite. Thus, this is no basis at all for distinguishing *Nara* and *Laws* from the present case.

Finally, the State contends that *Nara* and *Laws* are somehow distinguishable because "equitable tolling is a matter of discretion." Opp. Br. 16. That is, of course, entirely irrelevant. Whether or not a court abuses its discretion in applying or refusing to apply equitable tolling, it does not negate the threshold right to an evidentiary hearing to inform the court's exercise of discretion. *Nara* and *Laws* make clear that where, as here, a petitioner makes a credible allegation of mental illness, then an evidentiary hearing is *required* to determine whether that mental illness caused the untimely filing. That is precisely why the Third and Ninth Circuits *reversed* the decisions of district courts that, on materially indistinguishable facts, refused to conduct

evidentiary hearings on the causation question. *Nara*, 264 F.3d at 320; *Laws*, 351 F.3d at 924-25.

In short, as the State previously conceded, the holding in this case is in direct conflict with *Nara* and *Laws* on an important question of federal law—whether a mentally ill habeas petitioner is entitled to an evidentiary hearing to determine whether her mental illness affected her ability to meet AEDPA's one-year period of limitations.

2. The State also asserts that this Court should deny certiorari because this Court has yet to resolve the threshold question whether equitable tolling is *ever* authorized under AEDPA. *See* Opp. Br. 10, 17; *see Lawrence v. Florida*, 549 U.S. 327, 336 (2007) ("assum[ing] without deciding that" "§ 2244(d) allows for equitable tolling") (citation omitted); *Pace v. DiGuglielmo*, 544 U.S. 408, 418 n.8 (2005) (same). This, however, is no reason at all to deny certiorari and, if anything, favors a grant. The circuits have uniformly ruled that equitable tolling *does* apply to AEDPA. *See* Pet. 9 n.1; Opp. Br. 10. And while one judge has questioned this uniform rule, *see Solomon v. United States*, 467 F.3d 928, 936 (6th Cir. 2006) (Griffin, J., dissenting), the likelihood of a split developing is remote to say the least. Thus, the *only* vehicle for resolving this important threshold question is a case, like this one, that presents the question whether equitable tolling is appropriate (assuming it applies at all). *See also, e.g.*, Brief for California, *et al.*, as *Amici Curiae*, *Belleque v. Kephart*, No. 06-1015 (U.S. Feb. 23, 2007), 2007 WL

604974 (asking that the Court grant certiorari and hold that equitable tolling does not apply under AEDPA).[1]

3. Finally, the State argues that, under the facts of this case, Ms. McSwain should not be entitled to equitable tolling, because the facts do not establish that Ms. McSwain's mental illness *caused* her to miss AEDPA's one-year filing deadline. *See* Opp. Br. 10-12. This is, again, the question of "causation" that divides the circuits: The Third and Ninth Circuits have held that where, as here, a petitioner makes a credible allegation of mental illness, an evidentiary hearing is required to assess whether that mental illness affected the petitioner's ability to meet AEDPA's one-year limitations period. The Sixth Circuit, in contrast, has reached the opposite result,

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[1] Although somewhat unclear, the State may be suggesting that this Court can *never* grant certiorari on *any* equitable tolling question because it is not "clearly established" law under 28 U.S.C. § 2254(d) that equitable tolling *ever* applies under AEDPA. Opp. Br. 7 (arguing that "habeas review under 28 U.S.C. § 2254(d) is limited to clearly established precedent of this Court, and this Court has never held that equitable tolling applies to § 2254 cases"). Under this Catch-22, this Court could *never* resolve the threshold question whether equitable tolling applies, and, if so, whether it applies in a given case. Likewise, under this argument, the myriad lower court decisions allowing equitable tolling under AEDPA would all be wrong, since they would have done so even though (in the State's view) the question whether equitable tolling applies at all is not and never could be the "clearly established precedent of this Court." Needless to say, the State offers no support for this puzzling assertion.

denying an evidentiary hearing and thus denying an opportunity for further factual inquiry into the causation issue.

Similarly, the State's erroneous assertion that Ms. McSwain "was . . . represented by an attorney at the time she filed her federal habeas petition" (Opp. Br. 11 (internal quotation marks omitted)) offers no ground against Ms. McSwain's request for this Court's review. Ms. McSwain vigorously disputes that she was represented by counsel in the federal habeas proceedings.[2] But if the State has a bona fide dispute here, this, too, along with any questions concerning causation, are for the evidentiary hearing which she was wrongly denied below, but would have received in the Third or Ninth Circuits.

CONCLUSION

For the foregoing reasons, the petition should be granted.

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[2] Although Ms. McSwain's standard form habeas petition was signed by attorney John L. Grace III (Pet. App. 129a), in two subsequent letters to the Magistrate Judge below, Mr. Grace insisted that Ms. McSwain's petition was filed "In Pro Per" (*id.* 145a), and that he "[did] not represent [Ms. McSwain] in this matter." *Id.*; *see id.* 147a. Other than that standard form, and until she was given appointed counsel in the Sixth Circuit, Ms. McSwain acted *pro se* throughout the proceedings below—including, critically, when she filed her response to the State's motion to dismiss in the district court. *Id.* 133a-235a, 4a.

Respectfully submitted,

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